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IN THE MATTER OF:		
Hixon Millender, Jr. Claimant		
Against		
Ingalls Shipbuilding, Inc. Employer/Self-Insurer	Case Nos.:	1999-LHC-1046
and	OWCP Nos.:	6-168227 7-148597
Director, Office of Workers' Compensation Programs, U.S. Department of Labor		
Party-In-Interest		

APPEARANCES:

Sue Esther Dulin, Esq.
For the Claimant

Paul B. Howell, Esq.
For the Employer/Self-Insurer

Kathleen G. Henderson, Esq.
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING ADDITIONAL BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 4, 1999 in Gulfport, Mississippi, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, JX for a joint exhibit and EX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 31	Attorney Dulin's letter suggesting a post-hearing briefing schedule	12/20/99
ALJ EX 19	This Court's **ORDER** confirming such schedule	12/21/99
DX 1	Director's brief	02/07/00
CX 32	Attorney Dulin's letter requesting a short extension of time for the parties to file their briefs	02/14/00
ALJ EX 20	This Court's **ORDER** granting such extension	02/14/00
EX 31	Employer's brief	02/11/00
EX 32	Employer's response to DX 1	02/14/00
CX 33	Claimant's brief	02/22/00
DX 2	Director's reply brief	03/29/00

The record was closed on March 29, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On November 13, 1995, Claimant suffered an injury to his neck in the course and scope of his employment. Claimant also alleges that he suffers from an ulnar nerve entrapment on the right side, as well as right carpal tunnel, as a result of that injury. Claimant also alleges that on or about March 23, 1998 he sustained bilateral carpal tunnel syndrome due to repetitive use trauma as a result of his maritime employment as a mobile crane operator.

4. Claimant gave the Employer notice of the neck injury on November 4, 1995 and as to the repetitive use injury on May 18, 1998.

5. Claimant filed timely claims for compensation and the Employer filed timely controversions on November 22, 1995 with

reference to the neck injury and on May 18, 1998 with reference to the alleged repetitive use injury.

6. The parties waived the informal conference.

7. The applicable average weekly wage is in dispute.

8. The Employer voluntarily and without an award has paid temporary total compensation for certain periods of time. (JX 1; EX 6, EX 7)

The unresolved issues in this proceeding are:

1. Whether Claimant's carpal tunnel syndrome, ulnar nerve entrapment and hypertension constitute work-related injuries.

2. If so, the nature and extent of Claimant's disability.

3. The date of his maximum medical improvement.

4. Claimant's average weekly wage.

5. Whether Claimant requested that the Employer authorize treatment for his hypertension.

6. Attorney fees, penalties and interest on past due compensation.

7. Whether Claimant is entitled to a **de minimis** award.

8. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Hixon Millender, Jr. ("Claimant" herein), fifty-nine years of age, with a high school education and an employment history of manual labor, primarily as a mobile crane operator for approximately thirty (30) years, began working on April 5, 1965 as a painter's helper at the Pascagoula, Mississippi shipyard of Ingalls Shipbuilding, Inc., ("Employer"), a maritime facility adjacent to the navigable waters of the Pascagoula River and the Gulf of Mexico where the Employer builds, repairs and overhauls ships. (EX 1) He worked as a helper for about eleven months and he was then transferred to work as a fan operator for about fourteen months. He then became a mobile crane operator and he had duties of operating the large cranes which run on gantry tracks throughout the shipyard. These cranes have seventy-five (75) foot overhead booms and Claimant must climb vertical ladders to reach the cab, and once in the cab he has to constantly and repetitively operate and manipulate ten to twelve hand controls located on each side of the cab. He manipulated those controls during his entire eight hour shift, as well as on overtime as directed, Claimant remarking

that his work produced much vibration and bouncing around in the cab. (EX 28 at 3-7, EX 2; TR 91-94)

On November 13, 1995 Claimant, while working the second shift at the shipyard's wet dock and while running "the big forklift" and switching the "gantries from one track to the other", by "running into (or ramming) the gantry legs (with the forklift) to switch them," injured his upper back and both shoulder; he then "started to have pain in (his) right arm and fingers" and his "two fingers were tingling and numb." As the injury occurred near the end of his shift, he continued to work and told his supervisor, Isaiah Parker, about the injury. However, by the next day, the symptoms worsened (EX 3) and he went to the Employer's yard hospital where Dr. Warfield examined him and prescribed hot packs for his back and some medication. Claimant then returned to work and finished the shift. The symptoms continued and Claimant went to Dr. Chris E. Wiggins on November 27, 1995 as his choice of physician (EX 4), and the Employer authorized that selection. (EX 28 at 8-11; TR 94-96)

Dr. Wiggins injected cortisone into the right shoulder, which was most symptomatic, and the doctor's impression was a "sprain right periscapular musculature," the doctor noting that Claimant's November 20, 1995 cervical spine x-ray at Singing River Hospital (SRH)"shows degenerative arthritic change and probable degenerative disc disease and spurring." The doctor allowed Claimant to continue working his regular job and scheduled a follow up visit. The symptoms continued and Dr. Wiggins, an orthopedic physician, referred Claimant for a neurological evaluation by Dr. John J. McCloskey. (EX 16, EX 15; TR 96-97)

Dr. McCloskey examined Claimant on May 17, 1996 for evaluation of "right shoulder and arm pain with pain, numbness and tingling radiating particularly to the right ring and little finger," and the doctor, after the usual social and employment history, his review of diagnostic tests and the neurosurgical evaluation, gave his impression as a herniated disc at the C7-T1 level on the right and, as Claimant has "been having trouble now for about six months" and as his "problem is getting worse instead of better," the doctor opined that "it would be reasonable to do a complete evaluation at this point to see what the situation is and what the options might be." Thus, the doctor" recommended a cervical myelogram, electrical studies of the right arm, a chest x-ray, EKG and routine laboratories" studies. The doctor kept Claimant out of work as totally disabled. Those tests showed "a very large disc herniation at C7-T1 on the right" and the doctor recommended surgery. Claimant at first was reluctant to agree to the surgery but the symptoms persisted and he finally underwent "a posterior decompression" on October 15, 1996. The final diagnosis also included hypertension and a preretinal hemorrhage in the right eye. (EX 17 at 1-7)

Dr. McCloskey continued to see Claimant as needed, prescribed a course of physical therapy, a functional capabilities evaluation (FCE), an MRI scan and electrical studies of his arm. These latter studies "suggested) that the problem with (Claimant's) arm is coming from (the) neck" and MRI scan "does show uncomplicated post-operative changes in the area where (he) had (his) surgery," and, according to the doctor, "it doesn't appear that there's going to be an easy solution to (the) problem." As of December 15, 1997 Dr. McCloskey opined that Claimant had reached maximum medical improvement and he released Claimant to return to work as of January 5, 1998, although "an evaluation from psychiatry might be a realistic picture of what he might be expected to do and not to do." (EX 17 at 8-32)

Dr. John M. Wyatt, a physiatrist, examined Claimant on January 22, 1998 and, as of January 28, 1998, the doctor reported that "the patient has wasting of the first dorsal interosseus" and "some palmar wasting," as well as "percussion tenderness overlying the ulnar nerve on the right." Dr. Wyatt recommended "electro-diagnostic studies to evaluate the patient's peripheral nerves." On February 13, 1998 the doctor's diagnoses were: bilateral carpal tunnel syndrome; ulnar entrapment at elbow on the right and possible C-5 radiculopathy. He was released to return to work with these restrictions: limit lifting to 30 lbs occasional, 10 lbs frequently, 5 lbs constantly, no repetitive motion both hands; no climbing; no overhead activities; position may include sitting with standing; no heavy equipment and no forklift operations, according to the doctor.

Dr. Wyatt reported that Claimant "was (out of work) under the care of Dr. R.W. Stewart for non-industrial reasons from March 9, 1998 until March 26, 1998. On March 26, 1998 Mr. Millender was able to be placed at work within the restrictions as previously outlined. He was allowed the use of a cane and cervical collar... although (the doctor is) not sure these are necessary" and "there does not appear to be any medical indication for them." Dr. Wyatt opined that "the patient can go back and function as a flag waver for the crane." As of May 27, 1998 the doctor further opined that Claimant was able to perform his work duties, even with his carpal tunnel syndrome, as that work is within his restrictions for his cervical injury. (EX 19)

Claimant testified that he met with Ms. Melinda Wiley, the Employer's light duty coordinator, and that he told her on March 6, 1998 that he was only able to work four hours because of the right arm pain and that Dr. Stewart took Claimant out of work until March 23, 1998, at which time he returned to work "flagging traffic between gantries" in three directions. He again was able to work four hours upon his return to work as the prolonged standing, repetitive use of both hands and the constant turning of his head aggravated the pain in his neck and both shoulders. He reported the pain to the dock master, a supervisor gave Claimant a ride to

the office where Claimant was given a pass to permit him to go the yard hospital. He then went to see Dr. Stewart who referred him for a neurological consult with Dr. McCloskey. Claimant was unable to work on March 23 and 24, 1998 and Dr. McCloskey examined Claimant on April 4, 1998, at which time the doctor's impression was:

1. Post-cervical diskectomy syndrome;
2. Possibly significant ulnar entrapment at the right elbow;
3. Median nerve compression at the right wrist, minimally Symptomatic;
4. Hypertension

According to the doctor, "the evidence of an ulnar compression at the elbow has progressed and it's possible that he might well benefit from an ulnar nerve transposition." As of May 23, 1998 Dr. McCloskey recommended a cervical myelogram, repeat EMG and nerve condition studies of the right arm. The myelogram "looked tremendously better than it did before the surgery" and the studies showed "mid ulnar entrapment of the right elbow and wrist." Dr. McCloskey, as of July 17, 1998, opined that no further treatment was needed for Claimant, that his disability rating remained at fifteen (15%) percent of the body as a whole, that he is permanently limited to sedentary type work, should not lift anything more than 10-15 pounds occasionally, is "not going to be able to do overhead work," and is "not going to be able to do work in which he has to hold his right arm in the air, such as being a flagman." (EX 17 at 33-45, 52-53)

As of December 16, 1998 Dr. McCloskey "released him to work again with a new set of restrictions, which include a 20 lb. weight limit"(EX 17 46-48) and the doctor gave Claimant a disability slip to excuse his work absence from December 2, 1998 through December 16, 1998 (EX 17 at 49-51) as the Employer had work available only as a forklift operator, which work violated his restrictions. (EX 17 at 48) He finally returned to work on February 1, 1999 but was able to work four hours and twenty one minutes because of the prolonged standing in the wheelabrator building; he later was told he could sit, stand or walk as needed to relieve his symptoms. The wheelabrator is a very large machine and is used to remove rust from large pieces of steel from the ships and Claimant was assigned duties of signaling by his hands the operator of the fawn machine which is used to move those large pieces into and out of the wheelabrator building. The record reflects much testimony about that specific job by Claimant, David Taylor, a co-worker, Leon Chambers, Claimant's supervisor, as well as Dr. McCloskey and Dr. Wyatt. (EX 28 at 13-42; EX 26; EX 29; TR 42-90)

Claimant has continued to be paid his regular wages as a mobile crane operator and is still classified in that job category, although he works on light duty in the wheelabrator building. He sees Dr. McCloskey, Dr. Wyatt and Dr. Stewart, his family

physician, as needed. Claimant alleges work-related injuries on November 13, 1995 and March 23, 1998, the latter occurring while he was doing flagging work, He has had no prior neck problems before November 13, 1995. (CX 28 at 43-48)

As of March 19, 1999, Dr. McCloskey opined that Claimant's November 13, 1995 injury had resulted in that "large nerve root defect at C7-T1 with right shoulder and arm pain causing numbness and tingling, radiating to the right and ring and little fingers resulting in a decompressive hemilaminotomy at C7-T1 on October 15, 1996," that such injury has "resulted in a permanent impairment to the body as a whole of 15%" with a date of maximum medical improvement of December 15, 1997, that Claimant cannot return to work as a crane operator, that such injury has resulted in permanent restrictions which were updated on January 11, 1999, that Claimant was temporarily disabled from May 27, 1996 through June 23, 1996; from June 24, 1996 and continued off work when referred to Dr. Wyatt on December 16, 1997; for March 23, 1998 and March 24, 1998; from December 2, 1998 through December 16, 1998 and for March 15, 1999 and that Claimant reached maximum medical improvement on July 17, 1998 for his right carpal tunnel syndrome and ulnar entrapment at the right elbow which resulted in a permanent impairment of fifteen (15%) of the right arm. (EX 17 at 55-57)

Dr. McCloskey next saw Claimant on March 31, 1999, at which time he was "still struggling with neck, bilateral shoulder and right arm pain and weakness, numbness and tingling in right hand," as well as "losing muscle in his right hand." The doctor found Claimant blood pressure reading at 202/100 and changed the medication from Relafen to Celebrex, 200 mgs. a day. The doctor next saw Claimant on August 9, 1999, at which time Claimant reported that he had been out of work since July 23, 1999. The doctor's impression was persistent post cervical laminectomy syndrome and high blood pressure and he suggested Claimant follow up with Dr. Stewart for his high blood pressure. He continued the maximum medical improvement date and the permanent restrictions but" did add a restriction against having him work as a (flag) man" because "that's something that would be very difficult for him to do with the problems he's having with his right arm and hand." (EX 19 at 60-63) However, ten days later Dr. McCloskey removed the restriction against working as a flagman because he "had in mind that (Claimant) would have to stand all day waving a flag over his head " and that " turns out not to be the case." Accordingly, the doctor "revised his restrictions back to the way they were originally and returned him to work on Wednesday, August 25th." (EX 17 at 64-68)

As of October 25, 1999, Dr. McCloskey stated as follows (EX 17 at 69) (Emphasis added):

> **Mr. Millender's work injury did not cause his hypertension. He does not have to wear a neck brace. If it makes him comfortable, I would have no objection to him wearing it. I know of no reason why he has to use a cane.**

Reginald Stewart, D.O, is Claimant's family doctor and his record relating to Claimant's office visits since June 7, 1990 are in evidence as EX 20. Records relating to Claimant's hypertension are in evidence as EX 21 at 3-4, EX 22 at 1-5. (TR 161-162) Claimant did not ask the Employer for authorization to see Dr. Stewart for his hypertension. (TR 163)

Claimant works eight hours per day, five days per week, and is able to perform his work duties as he is able to sit, stand and walk around as needed to relieve his symptoms. (TR 155-157)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first

instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which

could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation for certain of his medical problems and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee’s condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS

94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employer bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that Claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a Claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If the Employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the

opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his cervical problems, his ulnar entrapment and right carpal tunnel, his hypertension and bilateral carpal tunnel syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between Claimant's cervical problems and his maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury. In the case at bar, however, the Employer has offered specific and comprehensive evidence relating to Claimant's hypertension, his ulnar entrapment on the right and right carpal tunnel. Thus, the Employer has rebutted the statutory presumption in Claimant's favor on those problems, does not control the result herein and I shall now proceed to weigh and evaluate all of the evidence in this closed record.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury.

Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I find and conclude, that Claimant’s November 13, 1995 shipyard accident has resulted in an injury to his neck, upper back and right shoulders, that such injury shall be classified herein as a cervical injury, that the Employer had timely notice of such injury (EX 3, EX 15), that the Employer has authorized appropriate medial treatment for such injury and has paid certain compensation benefits therefor (EX 4, EX 6, EX 7)and that Claimant timely filed for benefits once a dispute arose between the parties. (EX 8)

This closed record also conclusively establishes that Claimant’s persistent right C8 radiculopathy, ulnar nerve entrapment on the right elbow and median nerve compression at the right wrist (EX 17) constitutes the natural sequela of his November 13, 1995 injury. However, there is no probative or persuasive evidence that Claimant’s hypertension since age 25 constitutes a work-related injury as that is a personal condition and as there is no evidence that such condition was aggravated, accelerated or exacerbated by his maritime employment. In this regard, I accept Dr. McCloskey’s uncontradicted opinion as expressed on October 25, 1999 that Claimant’s hypertension is not related to his maritime employment in any way. Dr. Noland agrees. (EX 22; EX 17 at 69)

Accordingly, as Claimant’s hypertension is not a work-related condition, the Employer is not responsible for any of the medical bills relating to such condition. Moreover, Claimant admitted that he did not seek prior approval from the Employer before seeing Dr. Stewart for such condition. (EX 20; TR 163)

Moreover, there is no probative evidence that Claimant suffers from carpal tunnel syndrome, either on the right side or bilateral. While Dr. Wyatt initially suspected right side carpal tunnel syndrome (EX 19), I initially note that Dr. Wyatt has not seen Claimant since March 31, 1998 and the doctor's tentative opinion is far outweighed by the forthright and well-documented opinions of Dr. Terry Millette, a neurologist, that Claimant's hand problems were the result of a chronic C8-T1 lesion, which is the location of his cervical injury and surgery. (EX 17 at 51). Dr. McCloskey agreed that Claimant's right hand problems were related to his cervical injury (EX 17 at 26, 52-53) and "to radiculopathy due to the post cervical diskectomy syndrome."

Accordingly in view of the foregoing, I find and conclude that Claimant's right hand problems are not due to carpal tunnel syndrome but are causally related to his cervical injury. As Claimant's cervical injury is not a so-called scheduled award, he is not entitled to a schedule award. In this regard, **see Andrews v. Jeffboat,** 23 BRBS 169 (1990).

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); Owens v. Traynor, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), cert. denied, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible**

Offshore, Inc., 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a crane operator. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant had a total disability during those closed periods of time he was unable to work because of his November 13, 1995 shipyard injury, and such periods will be specifically delineated below.

Initially, I note that the Employer has provided for Claimant suitable alternate work, within his restrictions, in the so-called wheelabrator building. That work is a necessary part of the shipbuilding process, must be performed by one of the Employer’s employees and the Employer is to be congratulated for, and is encouraged by this judge to continue, that alternate work program to return to work its employees with restrictions, thereby effectuating the principles of the **Americans with Disabilities Act** and the Second Injury Fund.

Claimant, David Taylor and Leon Chambers gave detailed testimony about that work and I agree with Dr. McCloskey and Dr. Wyatt that such work is within the Claimant’s restrictions and that he can perform such work eight (8) hours per day, forty (40) hours per week, if properly motivated to do so, as that work allows Claimant to sit, stand and walk around as needed. He is still classified as a crane operator, receives his regular wages as a first class crane operator and, thus, has sustained no economic disability after March 8, 1998, at which time the Employer provided suitable light duty work for the Claimant, as well as after February 1, 1999, at which time he was assigned to return to work in the wheelabrator building. However, Claimant is entitled to compensations benefits on those days he was unable to work because of such injury and on those days he had to seek medical treatment, as summarized herein.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement". The determination of when maximum medical improvement is reaches so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Broad has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O Personnel Support Department**, 10 BRBS 670 (1979). The Board also held that a disability need not be "eternal or everlasting to be permanent and the possibility of a favorable change does not foreclosed a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (184), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773(1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled. **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in an temporary total case is the same as in a permanent total case. **Bell, supra**. **See also Walker v. AF Exchange Service**, 5 BRBS 500 (1977); **Swan v, George Hyman**

Construction Corp., 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 CRT) 2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech, v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Eclectic Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 27, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act of (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1)-(20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.,** 16 BRBS 120 (1084), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on December 15, 1997 and that he has been permanently and totally disabled from December 16, 1997, according to the well-reasoned opinion of Dr. McCloskey. (EX 17 at 30-31)

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the

employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tanner**, 731 F.2d 199 (4th Cir. 1984); **Roger's terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 102 (1985), **decision and order on reconsideration**, 17 BRBS 160 (1985). An award for permanent partial disability in a claim not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4,6 (1988). If a claimant cannot return to his usual employment as a result of his would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss if wage-earning capacity. **Cook, supra**. Subsection 8(c)(21)and 9(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid at the time of his injury. **Richardson, supra; Cook, supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 D.2d 33 (lst Cir. 1987), Senior Circuit Court Judge Baily Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be fixed amount, not to vary from month to month to follows current discrepancies. **White, supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and the compared to the employee's average

weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

The law in this area is very clear and if an employee is offered a job at his pre-jury wages as part of his employers rehabilitation program, this Administrative Law Judge can find that there is no lost-wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case **sub judice**, the Employer submits that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above, but the parties are in disagreement as to Claimant's post-injury wage-earning capacity and whether such wages establish economic disability.

As noted above, Claimant was offered a modified position as a flag man at the shipyard on February 27, 1998. (EX 23 at 1) Initially, instead of returning to work, Claimant went to see Dr. Stewart for treatment of his hypertension, a non-work-related personal condition from which he has suffered since age 25. Dr. Stewart brought the personal illness under control by March 23, 1998 (EX 20 at 9), at which time he returned to work at the shipyard; this return to work was monitored by a vocational rehabilitation consultant retained by the Department of Labor. Mr. Joe Walker, who has testified before this Administrative Law Judge many times, determined the job Claimant was offered as a flag man in the area of the gantry tracks was within his residual work capacity and the restrictions imposed and agreed to by all of the physicians who have examined and treated Claimant. (EX 24 at 5)

Claimant's motivation to return to work has been questioned in the past by the physicians and both Dr. McCloskey and Dr. Wyatt have also questioned Claimant's continued use of a cervical collar and a cane, none of which medical devices are deemed medically necessary. (EX 24 at 8, EX 19 at 7) However, even though such work was suitable for Claimant he worked only about ninety (90) minutes or so before leaving allegedly because of subjective complaints. (EX 24 at 10) However, as of March 31, 1998, Dr. Wyatt again opined that Claimant could perform the duties of the flag waver for the crane operator. The doctor kept Claimant out of work for that one day only and he directed Claimant to return to work with no additional restrictions. (EX 24 at 7-8)

Moreover, as of July 17, 1998, Dr. McCloskey once again released Claimant to return to work, restricted him to light duty

work with lifting no more than 10 to 15 pounds occasionally, no overhead work **and no work such as being a flag man which requires him to hold his right arm in the air.** (EX 17 at 44)

On January 25, 1999 the Employer once again provided the Claimant with work which accommodated the restrictions imposed by Dr. McCloskey on December 2, 1998 (EX 15 at 17), work as a flagman in the areas of the wheelabrator. (EX 29 at 18) This is extremely light duty work and Claimant is paid his regular wages for that necessary shipyard work. Claimant's supervisor, Leon Chambers, is satisfied with the quantity and quality of Claimant's work and he has not given the Claimant any warning slips for doing poor work or for his attendance at work.

Mr. Tommy Sanders, a certified vocational rehabilitation consultant, has performed an analysis of the flagman job to which Claimant has been assigned since February of 1999 and has concluded that that job is within Claimant's work limitations. (EX 27 at 3-5) Additionally, as an alternative, Mr. Sanders has identified three jobs in the open labor market which are suitable and available to the Claimant if he diligently sought same. (EX 27 at 6-10) Mr. Sanders also opined that those jobs were available to Claimant retroactive to February of 1999. (EX 27 at 7-9)

When Dr. McCloskey was advised of Claimant's **actual duties as a flagman,** he opined that Claimant could perform that job as it "was fairly sedentary." (EX 17 at 60) Ms. Wiley, the Employer's Return to Work Coordinator, also agrees that Claimant can perform the duties of a flagman and has sustained no economic disability as he continues to receive his regular wages as a mobile crane operator. (CX 24)

As noted above, the Employer has voluntarily paid compensation benefits to Claimant from November 15, 1995 through November 28, 1995; from May 15, 1996 through May 19, 1996; from May 22, 1996 through June 18, 1996; and from June 25, 1996 through March 8, 1998, based upon an average weekly wage of $561.90 with a compensation rate of $374.60.

As Claimant was unable to work during those time periods, he is entitled to an award for his temporary total and permanent total disability during those closed periods of time, based upon his average weekly wage of $561.90, as determined below.

Moreover, Claimant is not entitled to a **de minimis** award of $1.00 per week simply to keep his claim "alive" as he has not shown the likelihood of a future decrease in his wage-earning capacity. In this regard, **see Metropolitan Stevedore Company v. Rambo,** 521 U.S. 121, 117 S.Ct. 1953 31 BRBS 54 (CRT) (1997). Furthermore, a claim for medical benefits is never time-barred.

As noted above, Claimant's motivation to return to work has been questioned by the physicians and by the Employer and it is apparent to this Administrative Law Judge that he has tried to take himself out of the job market now that he has been awarded disability benefits by the Social Security Administration. This closed record conclusively establishes, and I so find and conclude, that there are light duty job available for him at the shipyard, that these jobs are within his residual work capacity and his work restrictions and that, if properly motivated, he can perform the duties of those jobs.

Claimant has established no economic disability after March 8, 1998 because on March 6, 1998 he had met with the Employer's return to work coordinator, Ms. Melinda Wiley, and refused to sign the return to work form (CX 6 at 19) even though the doctors, Mr. Walker and Mr. Sanders have agreed that Claimant could perform light duty jobs made available by the Employer over the years. Claimant unilaterally refused to work and, as Dr. McCloskey had released him as having reached maximum medical improvement, Claimant went to see Dr. Stewart, his family doctor, who, because of the subjective complaints and an elevated blood pressure reading, took Claimant out of work that day. He did attempt to return to work on March 23, 1998, again in an extremely light duty job of flagging for the gantry crane operator, work which all have agreed is suitable alternate employment for him. I say "all" because only Claimant is of the opinion that he is totally disabled.

Claimant worked as a flag man for four (4) hours and thirty-five (35) minutes, stopped working because of his alleged pain and he again returned to Dr. Stewart who again took Claimant out of work because of his subjective complaints. I note that Dr. McCloskey excused Claimant's work absences only for March 23 and 24, 1998 and he again released Claimant to return to work at the light duty job offered by the Employer. Claimant finally did return to work on December 3, 1998. (CX 22 at 25; TR 103) He again worked for only about four hours, stopped working and on February 1, 1999 he was assigned much easier work in the wheelabrator building as he could sit, stand and walk around in the building as needed to alleviate his subjective complaints. He was still classified as a mobile crane operator and was paid his regular wages, thereby sustaining no loss of wage-earning capacity.

I find and conclude that Claimant, if properly motivated, can perform the duties of a flag man because that is a "very undemanding job" and simply requires that he work perhaps five (5) minutes out of each hour flagging the material handlers to their proper positions. This job, in my judgment, is one of the easiest jobs at the shipyard, especially as it is apparent that his actual duties are "very minimal." Moreover, Ms. Wiley is not guilty of **ex parte** communications with Dr. McCloskey as she was simply contacting the doctor to make sure that he understood the exact

nature of the specific duties of a flag man for five (5) minutes out of each hour and once the doctor understood those specific duties (or, actually, lack thereof) he also agreed with Mr. Walker and Mr. Sanders that Claimant can perform that job.

I also disagree that such restriction was removed at the Employer's insistence, as alleged by the Claimant. Again Dr. Stewart took Claimant out of work on September 2, 1999 solely because of the subjective complaints and the elevated blood pressure reading.

I also find and conclude that the Employer has fulfilled its obligations under the Longshore Act by making available to Claimant suitable alternate employment within his restrictions and, in so concluding, I am guided by the precedents of the U.S. Court of Appeals for the Fifth Circuit, in whose jurisdiction this claim arises. It is apparent that Claimant does not have the proper motivation to return to and to continue working but he must now make a good faith effort to perform the light duty jobs offered by the Employer. It is also apparent that Claimant's unwillingness to return to work, or in making half-hearted attempts to perform the duties when he does show up for work, is influenced by other factors such as his qualification for and receipt of Social Security Administration disability benefits while out of work or by his essential hypertension, a personal illness from which he has suffered since at least age 25 and a condition which I have found above has not been aggravated, accelerated or exacerbated by his maritime employment.

As noted above, Claimant seeks also an award for his fifteen (15%) percent permanent partial impairment of the right upper extremity for his alleged right ulnar nerve entrapment at the elbow and right carpal tunnel syndrome as the natural sequela of his November 13, 1995 accepted work-related injury or because of a new and discrete injury on or about March 23, 1998 due to the repetitive use of his hands in operating the levers of the mobile crane. However, I have already found and concluded that Claimant did not sustain a new injury on or about March 23, 1998 as there simply is no evidence that Claimant's maritime employment has caused a new injury as alleged by Claimant. I have found and concluded that Claimant's impairment of the right upper extremity was causally related to the November 13, 1995 cervical injury and as the neck is not part of the schedule provisions of the Act at Sections 8(c)(1)-(19), Claimant is not entitled to an award for such impairment, even though the cervical injury has resulted in impairment to the right upper extremity. In this regard, **see Burkhardt v. Bethlehem Steel Corp.**, 23 BRBS 273 (1990); **Andrews v. Jeffboat, Inc.,** 23 BRBS 169 (1990).

Average Weekly Wage

For the purposes of Section 10 and the determination of the employer's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs 38 (1980), **rev'g and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The board has held that since Section 10(1) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 13 BRBS 207 (1990); **Klubnikin v Crescent Wharf & Warehouse Co.**, 126 BRBS 183 (1984). Moreover since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th Cir. 1983). Accordingly, this Administrative Law Judge should include the 4.4 weeks of vacation as time which claimant actually worked in the year proceeding his injury, giving him a total of 50_weeks. **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, (1990) **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks wages do not constitute "substantially the whole of the year," **Duncan, supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone, supra**. Claimant worked for the Employer for the fifty-two (52) weeks prior to his injury and the record reflects his actual wages. Therefore Section 10(a) is inapplicable.

As noted above, Claimant worked a total of 1,801.60 regular hours and he was paid an additional 176 hours of vacation time (EX 5 at 2), giving him a total of 1,977.60 hours in the 52 weeks prior to his November 13, 1995 injury. Those hours divided by the eight (8) hours he daily worked establish that he worked a total of 247.20 days during the pertinent period. Those days then became the divisor of his total wages for the period, $27,781.78, thereby producing an average daily wage of $112.38, which figure multiplied by 260 days, produces an average annual wage of $29,218.80 and, divided by 52, results in an average weekly wage of $561.90, pursuant to Section 10(a), and I so find and conclude.

I cannot accept the methodology utilized by the Claimant to allege an average weekly wage of S$640.01 or, in the alternative, of $581.20. The first figure unreasonably inflates Claimant's average weekly and is not permitted by Section 10(a) as I must include Claimant's vacation pay of 4.4 weeks or a total of 176 hours. Moreover, the second figure suggested by Claimant also inflates Claimant's average weekly wage as Claimant was earning, on the day of his injury, $13.40 per hour or $536.00 per week. The average weekly wage of $561.90, as determined by the Employer, is fair and reasonable and is more consistent with and closer to the $536.00 he was earning as of the day of his injury.

Accordingly, I find and conclude that Claimant's average weekly wage, pursuant to Section 10(a)of the Act, may reasonably be set at $561.90.

Medical Expenses

An employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 1(1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the case and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(B), is well-settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'g on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459

U.S. 1146, 103 S.CT. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) that claimant obtain employer's authorization prior to obtained medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1982); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physicians's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorized needed care, including surgical costs and the physicians's fee, are recoverable. **Roger's Terminal and Shipbuilding Corporation v. Director, OWCP**, 784 F.2d d687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physicians file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medial costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). See also 20 C.F.R § 702.422. However, the employer must demonstrate actual prejudice by late delivery of the physicians's report. **Roger's Terminal, supra**.

As found above, the Employer is not responsible for the medical bills relating to Claimant's hypertension as I find and conclude that such condition is a personal condition and does not constitute a work-related injury. Moreover, Claimant did not request that the Employer authorize such treatment by Dr. Stewart. (TR 163) Thus, the Employer is not responsible for the doctor's medical bills for this additional reason.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and**

rev'd on other grounds sub. nom Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . .the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changes to reflect the yield on United States Treasury Bills... **Grant v. Portland Stevedoring Company,** 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provision of Section 14(3), as the Employer timely controverted Claimant's entitlement to benefits. (EX 9, EX 10) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.,** 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v.**

Lockheed Shipbuilding & Construction Co., 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**,

16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

The Section 8(f) issue is moot herein as the Employer's obligation herein is limited to less than 104 weeks of permanent benefits. Thus, the issue will not be resolved at this time.

Attorney's Fee

As the Employer voluntarily and without an award has paid Claimant appropriate benefits for various time periods, as stipulated by the parties (JX 1) and as corroborated by this closed record and as benefits were properly terminated on March 8, 1998 because Claimant has not sustained any economic disability after that date and as this appeal to the Office of Administrative Law Judges has not resulted in any additional benefits being awarded to the Claimant, and not even the COLA's for the limited permanent total benefits awarded Claimant, this proceeding was not successfully prosecuted before the Office of the Administrative Law Judge.

Accordingly, Claimant's attorney is not entitled to a fee award to be assessed against the Employer for the legal services rendered before the Office of Administrative Law Judge and after February 16, 1999, the date of referral of this claim by the District Director.

In this regard **see Collington v. Ira S. Bushey & Sons,** 13 BRBS 768 (1981); **Barber v. Tri-State Terminals, Inc.**, 3 BRBS 244 (1976), **aff'd sub nom. Tri-State Terminals v. Jesse,** 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); **Butler v. LeMont Shipbuilding & Repair Co.,** 3 BRBS 429 (1976).

Moreover, I have not issued an award for future medical benefits as the Employer has not denied proper medical care for the Claimant's November 13, 1995 cervical injury and properly denied

payment of Dr. Stewart's bills as that treatment was (1) unauthorized and (2) related solely to his personal, non-work-related hypertension. Furthermore, there is no need for an award of future medical benefits as a claim therefor is never time-barred.

As noted above, I have denied a **de minimis** award as Claimant has not established, at this time, the likelihood that he will experience a decrease in his wage-earning capacity. In this regard, **see Rambo, supra.**

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from November 15, 1995 through November 28, 1995, from May 15, 1996 through May 19, 1996, from May 22, 1996 through June 18, 1996 and from June 25, 1996 through December 15, 1997, based upon an average weekly wage of $561.90, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on December 16, 1997, and continuing until March 8, 1998, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $561.90, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his November 13, 1995 cervical injury.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:dr